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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN F. CAMACHO, JR.,

Petitioner,

— v. —

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

IGNACIO R. GARCIA
Counsel of Record

LANI RAE SUISO GARCIA
RANDALL L.K.M. ROSENBERG
Law Offices of Garcia & Garcia
Dillingham Transportation Bldg.
735 Bishop Street, Suite 308
Honolulu, Hawaii 96813
(808) 536-4270

Counsel for Petitioner
JOHN F. CAMACHO

QUESTIONS PRESENTED

1. Where Petitioner is arrested and processed by law enforcement officers, and then makes a clear and unambiguous request for counsel before responding to any additional questions from said officers, is it a violation of Petitioner's Fifth and/or Sixth Amendment right(s) to counsel if the officers refuse to allow Petitioner to contact his attorney until they have read Petitioner his Miranda rights and taken additional biographical data, where this further questioning ultimately results in Petitioner making incriminating statements?

2. Is it permissible under the Fifth and/or Sixth Amendment(s) of the Constitution of the United States, for the Drug Enforcement Administration (DEA) to implement a policy as standard operating procedure, whereby an arrestee in a custodial setting, who requests to consult with his attorney before answering any questions, is to be routinely denied access to his attorney by the DEA until the arrestee is fully Mirandized and has provided additional biographical information to DEA agents?

3. Where Petitioner is arrested and then makes an unambiguous request for counsel which is not acknowledged by law enforcement officials who continue to question Petitioner about his Miranda rights and demand additional biographical data, if Petitioner subsequently asks whether he is being charged by the state or federal government, does Petitioner "initiate" communication within the meaning of *Edwards v. Arizona*, *Oregon v. Bradshaw*, and *Smith v. Illinois*, for purposes of determining whether Petitioner later waived his previously asserted right to counsel?

4. Where the government arrests and charges Petitioner with possession of one-half kilo of cocaine with the intent to distribute and seeks to sentence him within the guideline range of over 14 kilos on the sole basis of what a DEA agent said Petitioner told him, and Petitioner's sentence is thus increased under the Federal Sentencing Guidelines by over 3 years, should the Court impose a prophylactic brightline rule which requires that the government show objective evidence that said statement was adopted by the petitioner or otherwise recorded in written, audio, or video tape form to ensure that law enforcement officials do not supersede the sentencing authority of the Court?

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I. OPINIONS BELOW

The Memorandum opinion affirming the trial court, entered on March 29, 1991 by the United States Court of Appeals for the Ninth Circuit, is contained in the Appendix herein at 1a.

II. JURISDICTION

Petitioner seeks review of the Memorandum opinion entered on March 29, 1991. There is no order regarding rehearing and no extension of time sought nor granted for the filing of the instant Petition for Writ of Certiorari. Rule 14 (e) (iii), of the Rules of the Supreme Court, is not applicable. Jurisdiction is conferred upon this Court to review this matter under Title 28, U.S.C. § 1254 (1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21, U.S.C. § 841, reads in relevant part as follows:

Prohibited acts A

(a) **Unlawful acts**. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) **Penalties.** Except as otherwise provided in section 405, 405A, or 405B, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(1)(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

IV. STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

Petitioner was indicted by a Federal Grand Jury on or about May 11, 1989, on two counts of violating Title 21, U.S.C § 841 (a)(1). The United States District Court for the District of Hawaii asserted jurisdiction pursuant to Title 18, U.S.C. § 3231.

B. Statement Of Material Facts

On April 25, 1989, Petitioner John F. Camacho, an ex-police officer, was arrested by Drug Enforcement Administration (DEA) Agent Joseph Moussiaux, at the Kahului Airport, on the island of Maui, State of Hawaii, for Camacho's alleged involvement in a cocaine transaction. (Transcript of Proceedings, June 29, 1989, at page 2:line 22 - page 3:line 25 (hereinafter "Tr. 1, p:1.")) Approximately 453 grams of cocaine were recovered from Camacho at the time of his arrest. (Excerpts of Record, at 82 (hereinafter "E.R. p.")) Camacho was transported to the Maui Police Department where he was booked and processed by Maui Police officers. (Tr. 1, 4:10-13 and 6:18-25.) Agent Moussiaux testified that he, along with a Maui Police Officer, subsequently "confronted" Camacho in the police department holding cell, and told Camacho that "he was going to ask him a few questions." (Tr. 1, 7:1-6.) The purpose of these questions was to "elicit [Camacho's] source of supply of his cocaine, and to just debrief him on his involvement and his activities." (Transcript of Proceedings, December 11, 1989, at page 16:lines 10-17 (hereinafter "Tr. 2, p:1."))

Moussiaux further testified that Camacho asked to speak to his attorney before responding to any questions. (Tr. 1, 7:7-10.) However, instead of ceasing questioning and providing Camacho with an opportunity to call his attorney, or otherwise acknowledging Camacho's request, Agent Moussiaux ignored the request and instead began to read Camacho his "constitutional rights." (Tr. 1, 7:11-17 and 22:9-21.)

Even after Agent Moussiaux had finished informing Camacho of his constitutional rights, Moussiaux still refused to allow Camacho to call his attorney, insisting instead that Camacho answer a series

of "biographical" questions, despite the fact that most of the biographical information had already been obtained when Camacho was booked by Maui Police. (Tr. 1, 7:18-23 and 23:11-22.) Moussiaux admitted under cross-examination that he had no intention of allowing Camacho to call an attorney until Moussiaux was finished with his questions:

> Q: Okay. Now, after he indicated to you that he wanted to see his attorney, did you provide him an opportunity to call the attorney?
> A: No, I did not.
> Q: Did you ask him—did you inform him that he could use the phone to call up an attorney?
> A: I was going to wait until after I took his biographical data before I gave him that chance.

(Tr. 1, 22:9-16.)

These biographical questions included Camacho's height, weight, residence address, date of birth, children's names, former and present occupations, social security number, and other such items, (Tr. 1, 23:16-22), but some of the questions may have involved more than biographical data.

For example, the following exchange took place during Moussiaux's cross-examination:

> Q: . . . did you indicate to him after you told him you wanted his cooperation, that you would make a lawyer available to him?
> A: We were *discussing his alternatives and his options* and, no, I was still obtaining his biographical data.

(Tr. 1, 25:3-7 (emphasis added)).

This practice of not allowing an arrestee to speak to an attorney before reading the arrestee's rights and taking his biographical data is standard DEA procedure according to Agent Moussiaux. (Tr. 1, 7:18-23 and 23:11-22.) He stated on cross-examination:

> Q: So what did you do after?

A: I sat down and I informed him that I was going to be taking his biographical data, which is standard operating procedure with DEA.

(Tr. 1, 23:11-14.)

On redirect, the following exchange took place:

Q: Does DEA provide an opportunity to call an attorney after the booking but prior to the appearance before the magistrate for the purpose of bail or whatever?
A: Yes.

(Tr. 1, 35:22-25.)

Moussiaux claimed that Camacho "initiated" conversation about the ivestigation, thus waiving his right to counsel, when Camacho, either during or after the biographical questioning, "asked me if this was going to be a federal charge or a state charge." Later, after Moussiaux had apparently resumed questioning, Camacho allegedly asked whether "there was any chance, if convicted, he could do state time." (Tr. 1, 8:10-23.)

Camacho's version of these events is very different from Moussiaux's. Camacho testified that he was approached in the Maui Police Department holding cell by Moussiaux and an Officer Shinyama, a sergeant with the Maui Police Department. (Tr. 1, 41:18-22.) According to Camacho, after he requested an attorney, Agent Moussiaux grabbed the form containing Camacho's constitutional rights and walked out of the room with Officer Shinyama. (Tr. 1, 42:12-23.)

Approximately one minute later, Moussiaux returned and told Camacho, "[i]f you get an attorney now we can't make a deal." (Tr. 1, 42:20-43:1.) Moussiaux also stated, "I can't work with attorneys. You know how they are. I can't work with them." (Tr. 1, 43:2-4.) In an attempt to intimidate and bully Camacho, Moussiaux told him, "[y]ou being ex-policeman . . . Judge going to really come down real hard on you and you have to show us that you're not a big dealer." (Tr. 1, 43:7-10.)

Finally, Moussiaux actually threatened to arrest Camacho's wife and also threatened to transport Camacho to the Honolulu Police Department for booking (where Camacho had been a police officer

for 19 years), and embarrass him in front of his former fellow officers and friends. (Tr. 1, 43:22-44:5.)

Officer Shinyama interjected at least on one occasion to Camacho, that "[y]ou better cooperate." (Tr. 1, 46:1-8.) Similarly, Moussiaux told Camacho, "the only way you can get out of this with less time is if you cooperate with us and I'll see what I can do." (Tr. 1, 45:12-15.) Predictably, all of the pressure applied by Moussiaux and Shinyama made Camacho nervous and feel "like the whole world came down on me." (Tr. 1, 45:16-20.) However, at no time did Camacho initiate conversation with either Agent Moussiaux or Officer Shinyama. (Tr. 1, 46:8-11.)

Eventually, Moussiaux and Shimyama were able to persuade Camacho to waive his constitutional rights and cooperate with the investigation. Camacho was later transported to the Honolulu DEA office where he was required to sign a waiver of rights form. (Tr. 1, 31:20-32:18.) Moussiaux claimed that he did not ask Camacho any specific questions about the investigation until the waiver form was actually signed. (Tr. 1, 13:16-19.)

However, once the waiver had been signed by Camacho, Moussiaux began asking specific questions regarding Camacho's alleged drug activities including the identity and whereabouts of his "source." (Tr. 2, 18:1-14.)

Pursuant to his cooperation with the DEA, Camacho revealed the location and identity of his source, allowed DEA agents to search his work place and residence, and told DEA agents how the cocaine was transported from the mainland, and how it was transported locally. (Tr. 2, 18:7-19:10, 20:1-12, and 21:17-23:23.) The search of Camacho's residence led to the discovery of approximately 745.3 grams of cocaine. (E.R. 82.)

According to Moussiaux, Camacho also admitted to prior dealings with cocaine distribution, in the amount of approximately one kilogram at least once per month for one year. (Tr. 2, 19:11-25.) However, Agent Moussiaux admittedly failed to take any notes of the hour long "confession" and did not record the statement in any form. Instead, Moussiaux simply wrote up a report the next day, relying on his memory of the conversation. Camacho would not sign Moussiaux's version of Camacho's statement. (Tr. 2, 28:3-30:4.)

On April 26, 1989, Camacho was brought before United States Magistrate Bert Tokairin and was charged with possession of

cocaine with intent to distribute, in violation of Title 21, U.S.C. § 841 (a)(1). He was subsequently indicted by the Federal Grand Jury on May 11, 1989. (E.R. 63.)

On June 4, 1989, Camacho filed a Motion to Suppress, on the grounds that the confession and "statement" obtained from Camacho was obtained in violation of his right to counsel. However, Camacho's Motion was denied by the Honorable Samuel B. King, United States District Judge, after a hearing on June 29, 1989. (E.R. 63.) In a sworn affidavit attached to the Motion, Camacho attested that Agent Moussiaux's description of Camacho's statement was not fair and accurate. (E.R. 6.)

On August 4, 1989, Camacho entered a conditional plea of guilty to the charges and reserved his right to appeal the denial of his Motion to Suppress. (E.R. 15-17.) In the plea agreement, Camacho pled guilty to possession with the intent to distribute the amounts set forth in the indictment. (E.R. 1-2.)

On October 25, 1989, a presentence report was prepared by the United States Probation Office, which included a paragraph regarding the alleged admission of Camacho that he had distributed kilogram quantities of cocaine each month for the last year. (E.R. 69.) The report placed the Base Offense Level at Level 26, and recommended a two point reduction for acceptance of responsibility for a Total Offense Range of Level 24. (E.R. 70.) The report did not add any sentencing time for the alleged prior kilogram distributions which Camacho was not charged with and had not pled to.

Camacho objected to the inclusion of the alleged kilogram distributions in the report, for the reasons that Camacho disputed making any such admission, and, even if he had, the admission would have been taken in violation of Camacho's Constitutional rights. (E.R. 18-21.) The Government *also* objected to the presentence report but for the reason that the "admitted" additional distributions were not used in the calculation of the Total Offense Range. (E.R. 22-24.)

On November 9, 1989, the United States Probation Office amended their presentence report to include the additional distributions by increasing the applicable sentence range as requested by the Government. (E.R. 85.) This raised the Total Offense Range from Level 24 to Level 30 with an increase in the imprisonment

range from 51-63 months to 97-121 months, nearly *doubling* the sentence. Camacho again objected to the use of the additional distributions for the aforementioned reasons and also for the reason that any such admissions, if made, were made as an act of cooperation and should not be counted against him. (E.R. 25-33.)

On December 11, 1989, Camacho was sentenced to 97 months imprisonment by the Honorable Harold M. Fong, United States District Judge. Pursuant to issuing the sentence, Judge Fong noted as follows:

> The sentencing guidelines is a factor that — or is a factor that many of the federal judges rail against, because it has taken away from us the power and the discussion [sic] of going lower than what is required by the system.
>
> I have taken into consideration Mr. Camacho's lifetime of law enforcement. I have taken into consideration Mr. Camacho's drug habit as being a motivating factor to your involvement in crime.
>
> Everything points to a person who otherwise would respect the law, and who otherwise has given most of your adult life to law enforcement. Yes, I could sentence you as an ex-police officer to a longer period of time. Mr. Ishikawa [a character witness] advises otherwise, and he is correct, because the crime committed was not a crime of a police officer. It was a crime of a drug addict that you don't have control over your senses, that you don't have control over your habits, and you need the drugs in order to survive from day to day.
>
> Because of that, and because of your otherwise good record, the Court's only concession that it has available is to concede this matter in the manner and fashion that Mr. Garcia [counsel of record] and Mr. Ishikawa requested this Court, and that's to give you the minimum time that I am allowed to, albeit the time — three years in excess of what could have received otherwise.

(Tr. 2, 53:22-54:20.)

Camacho filed a timely Notice of Appeal on December 21, 1989, pursuant Rule 4 (b) of the Federal Rules of Appellate Procedure.

(E.R. 65.) After briefing and oral argument before the United States Court of Appeals for the Ninth Circuit, the judgment of the trial court was affirmed by way of a Memorandum opinion entered on March 29, 1991. (*See* Appendix, at 1a.)

Because Petitioner Camacho believes that the Ninth Circuit's ruling is at odds with the Constitutional principles set forth in this Court's opinions of *Miranda v. Arizona*, *Edwards v. Arizona*, *Smith v. Illinois*, and their progeny, this petition for writ of certiorari follows.

V. ARGUMENT

A. Ninth Circuit Case Law Improperly Allows Questioning Of An Arrestee Even After Counsel Is Requested

It is undisputed in the instant case that Petitioner made an unambiguous request for counsel before he was questioned by Agent Moussiaux. It is similarly undisputed that *at the very least*, Moussiaux did not allow Petitioner access to his attorney, but instead, read Miranda warnings and asked Petitioner for biographical data.

However, in the Ninth Circuit's Memorandum opinion entered in this case on March 29, 1991, the court noted that its prior decisions "consistently held that in most cases, routine biographical data is not interrogation because the information obtained does not inculpate accused." (*See* Appendix, at 2a (citing *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046 (9th Cir. 1990); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983))).

This doctrine has been developed from a line of Ninth Circuit cases which includes *Sheldelbower v. Estelle*, 885 F.2d 570 (9th Cir. 1989) (officer's statements to defendant who invoked right to counsel that accomplice was in custody (true) and had identified defendant as perpetrator (untrue) not considered functional equivalent of questioning or interrogation); *United States v. Disla*, 805 F.2d 1340 (9th Cir. 1986) (background or booking information not interrogation unless likely to elicit incriminating response); and *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1985), *cert. denied*, 473 U.S. 913 (1985) (subjective intent of agent and relationship of question to crime relevant to whether question is interrogation).

The Ninth Circuit has also held that continued Miranda warnings given after an invocation of the right to counsel, even where said warnings lead to a confession, does not constitute impermissible interrogation. *See People of Territory of Guam v. Ichiyasu* 838 F.2d 353 (9th Cir. 1988).

This appears to be squarely at odds with the United States Supreme Court's interpretation of the Fifth and Sixth Amendment protections. For example, in the landmark case of *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court, after creating a mandatory procedure that an arrestee be advised by law enforcement officials of his Constitutional rights, went on to hold that the assertion of the right to counsel was a significant event, and that once invoked, "the interrogation must cease until an attorney is present." 384 U.S. at 474.

Although the word "interrogation" was not defined, cases decided by this Court subsequent to *Miranda* offer guidance as to how this rule was to be applied.

For example, in *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court stated as follows:

> although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, [citation omitted], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [Footnote omitted.] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85.

In *Smith v. Illinois*, 469 U.S. 91 (1984), the accused was being advised of his rights when he made a seemingly ambiguous request for a lawyer. Instead of allowing Smith to contact a lawyer, the police officers *continued reading Smith his Miranda rights*. Smith eventually made several incriminating statements. 469 U.S. at 92-94.

In holding that the additional questioning after Smith's request for an attorney was impermissible, this Court reaffirmed the "prophylactic" and "bright line" rule of *Edwards*, stating that:

> Edwards set forth a "bright-line rule" that *all* questioning must cease after an accused requests counsel. [Citation omitted.] In the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching" — explicit or subtle, deliberate or unintentional — might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. (Emphasis original.)

469 U.S. at 98.

This Court did not rule that only questions "likely to elicit inculpatory or incriminating information" were impermissible, the Ninth Circuit rule, but held instead that *all questions* were impermissible once the accused exercised his right to counsel. Clearly, as a matter of policy, this Court has sought to eliminate the "inherently compelling pressures" expected where the police are allowed to continue communicating with an accused in the hopes that he will eventually consciously or unconsciously waive his constitutional rights.

This policy is particularly important with respect to an individual's right to counsel. As Justice White noted:

> the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

Michigan v. Mosley, 423 U.S. 96, 110 n. 2 (1975) (White, J.,

concurring in result) (cited with approval in *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)).

In the instant case, Petitioner clearly and undisputably requested counsel. He was legally and morally entitled to have counsel present with him during the reading of his Miranda rights and during the taking of his biographical information. By withholding counsel from him, and more importantly, *by Moussiaux's act of not even acknowledging his request for counsel*, Petitioner could easily have been given the impression that his request for counsel was not going to be honored at all, making cooperation and self-incrimination the only reasonable alternative.

This admitted DEA standard operating procedure implimented by Agent Moussiaux has clearly been crafted for the express purpose of intimidating the accused into making a confession before the accused has had a chance to have his rights, and the legal process, explained to him by an attorney. This is further evidenced by the fact that in this case, *Camacho had already been booked and his biographical information had already been taken by Maui police officers, prior to the questioning of Agent Moussiaux*. There was no conceivable reason for further "biographical" questioning other than to coerce the witness into making incriminating statements.

B. Nothing That Petitioner Is Alleged To Have Said Can Be Reasonably Construed As Initiation Of Conversation With Law Enforcement Officials

The Ninth Circuit found that the question regarding whether the "charges would be state or federal," attributed to Camacho by Moussiaux, "clearly 'evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship.'" (*See* Appendix, at 3a (citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983))).

Obviously, according to the Supreme Court opinions recited in the previous argument, the Ninth Circuit should never have reached the issue of initiation. Impermissible questioning after Camacho invoked his right to an attorney essentially rendered the subsequent questions of "initiation" and "waiver" moot as the earlier Consti-

tutional violation of continued questioning invalidated any subsequent statements or evidence taken from Petitioner. However, even assuming, *arguendo*, that these questions *are* reached in this case, the Ninth Circuit's reliance on *Oregon v. Bradshaw* is misplaced.

In *Oregon v. Bradshaw*, this Court confronted a fact pattern very different from that exhibited in the instant case. Defendant Bradshaw had been placed under arrest for furnishing liquor to a minor, but was also suspected by police of being involved in the death of the same minor. Upon being advised of his Miranda rights by a police officer, Bradshaw stated, "I do want an attorney before it goes very much further." 462 U.S. at 1041-42. The officer *immediately* terminated the conversation. *Id.* at 1042.

Later, when Bradshaw was being transported from the police station to the county jail, he asked the police officer who was accompanying him, "Well, what is going to happen to me now?" Significantly, the officer replied as follows:

> You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say — because — since you have requested an attorney, you know, it has to be at your own free will.

Id. at 1042.

After this additional warning, to which Bradshaw stated that "he understood," there was *further* discussion about the investigation. Bradshaw agreed to submit to a polygraph, and signed a waiver of his rights. *Id.* at 1042.

This court in *Bradshaw* made clear that the word "initiate" in an *Edwards'* context, does not include bare inquiries or other questions which relate to the "routine incidents of the custodial relationship." *Id.* at 1045. What the *Bradshaw* court found compelling was the fact that after the defendant "initiated" conversation, the officer again advised the defendant that he had requested counsel and did not have to speak, and that the defendant subsequently indicated that *he understood*. The majority, in the *Bradshaw* plurality opinion, found that "[o]n *these facts* we believe that there was not a violation of the Edwards Rule." *Id.* at 1046 (emphasis added).

It is interesting to note that even on the facts presented in *Bradshaw*, four of the justices were unpersuaded. The minority found that the defendant's comment, "what is going to happen to me now," was a simple desire to find out where the police were going to take him. *Id.* at 1055. In the minority view, the defendant did not initiate communication within the meaning of *Edwards* and thus, the subsequent incriminating statements should have been suppressed.

In contrast to *Bradshaw*, Agent Moussiaux never ceased questioning after Camacho requested an attorney. Nor did Moussiaux ever even *acknowledge* Camacho's request let alone afford him an opportunity to contact an attorney. This Court in *Edwards* stated that to establish a waiver of a previously invoked right to counsel, it is a "necessary fact that the accused, not the police, reopened the dialogue with the authorities." 451 U.S. at 486. In this case, Camacho could not have reopened dialogue with Moussiaux, *because Agent Moussiaux never ended the dialogue with Camacho after an attorney was requested.*

The threats reported by Camacho, that were allegedly uttered by Moussiaux, even if not believed by the Court, serve to further illustrate the fundamental problem with allowing exceptions to the bright line rule of *Edwards*, such as those being permitted by the Ninth Circuit. If police questioning is permitted to continue after the right to counsel is invoked by the accused, even if said questioning is purportedly limited to innocuous issues, there will *always* be a dispute as to whether it was the police who resumed interrogation or the accused who initiated conversation about the investigation when incriminating statements result. In a one-on-one battle of credibility before the court on a motion to suppress, the trial judge will almost always find the testimony of law enforcement sufficient to establish a knowing and intentional waiver of the accused's right to counsel by a preponderance of the evidence, particularly since the accused will rarely have additional eyewitnesses testifying on his behalf.

It was, in part, to avoid these exact problems in proof that the *Miranda* and *Edwards* procedural safeguards were created. As the dissent in *Bradshaw* argued:

> To hold that respondent's question in this case opens a dialogue with the authorities flies in the face of the basic purpose of the Miranda safeguards. When someone in custody asks, "What is going to happen to me now", he is surely responding to his custodial surroundings. The very essence of custody is the loss of control over one's freedom of movement. The authorities exercise virtually unfettered control over the accused. To allow the authorities to recommence an interrogation based on such a question is to permit them to capitalize on the custodial setting. Yet, Miranda's procedural protections were adopted precisely in order "to dispel the compulsion inherent in custodial surroundings." (Citation omitted.)

Bradshaw, 462 U.S. at 1056 (dissenting opinion).

Pursuant to these authorities, the Ninth Circuit's analysis fails. All of the statements and evidence obtained from Petitioner in violation of his Constitutional rights against self-incrimination and rights to counsel should have been suppressed.

C. The Court Should Establish A Bright-line Rule Requiring The Government To Objectively Memorialize All "Relevant Conduct" Admissions In Order To Insure That The Court, Not The Police, Establish The Proper Sentence Under The Federal Sentencing Guidelines

The present structure of criminal case sentencings in federal court has been completely revamped under the Federal Sentencing Guidelines, which became effective in November of 1987. The Guidelines now require the sentencing court to determine an applicable guideline sentencing *range* for a particular defendant, in terms of months. The sentencing range is based upon, *inter alia*, the actual offense, the circumstances surrounding the offense, the prior history of the defendant, and the relevant past conduct of the defendant.

These guidelines, as they apply to narcotics offenses, require the sentencing court to determine the aggregate amount of illicit drugs involved in the offense, (*see* § 2D1.1 of the Sentencing Guidelines, Appendix at 5a), as well as the defendant's relevant past conduct. (*See* § 1B1.3 of Guidelines, Appendix at 16a. *See also*

United States v. Turner, 898 F.2d 705 (9th Cir. 1990)). This aggregate amount is then used in determining the base offense level of the charge.

In the instant case, the Petitioner was arrested with approximately ½ kilogram of cocaine. The base offense level of this amount, pursuant to § 2D1.1 of the Guidelines, is level 26. In addition, under § 1B1.3 (a) (2) of the Guidelines, the court must take into account "all such acts . . . that were part of the same course of conduct or common scheme . . . as the offense charged."

In this case, the government presented the testimony of DEA Agent Moussiaux who asserted that Petitioner "admitted" to distributing a kilogram of cocaine per month prior to his arrest. As previously mentioned, Petitioner Camacho denied he made such an admission, and the admission itself was not recorded in any way. However, the admission still served to increase Petitioner's *base* offense level from Level 26 to Level 32. The maximum sentence under level 26 is 78 months. The maximum sentence under level 32 is 151 months. (*See* Sentencing Table, Federal Guidelines; Appendix at 20a.) Thus, on the strength of the testimony of the DEA agent alone, without any corroborating evidence whatsoever, Petitioner's sentencing range maximum was almost doubled.

The present case law allows this absurd result since the Government need only show, by a preponderance of the evidence, that the defendant had previously been involved in similar activities. In this case, the preponderance burden was met in the eyes of the court by the agent's testimony alone without a recorded statement, without independent corroboration, and despite Petitioner's vociferous denials.

It is imperative that this Court establish a bright-line rule to ensure that "relevant conduct admissions" (i.e., admissions that add on to the base offense level with no corroboration) are at least accurately presented. There is certainly sufficient precedent for such a rule. For example, as previously mentioned, this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), established just such a rule to prevent police misconduct with respect to an individual's Constitutional rights. As we all know, *Miranda* required a litany of warnings to be delivered to suspects in custody in order to ensure that the police did not abuse its psychological and/or physical advantage in obtaining confessions. Under the present

legal structure, the investigating officer can easily abuse the public trust placed upon him by merely "interpreting" the suspect's statement into admissions of greater amounts of illicit drugs.

Conceivably, it can even become within the power of the investigating agent to assure a particular sentence. This potential for abuse by law enforcement must be addressed as this Court has done in the past.

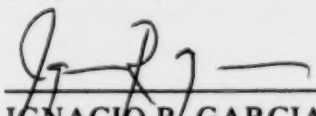
Recently, this Court actually commented on this specific problem in a somewhat different context. In *Arizona v. Roberson*, 486 U.S. 675 (1988), this Court noted, in analyzing the need for assistance of counsel during interrogation, that "the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained *are accurately transcribed for presentation into evidence.*" *Id.* at 683 n. 4 (emphasis added). *Without* the presence of a lawyer, it becomes even more critical to have some sort of recorded, corroborated, or otherwise adopted statement.

The advent of the Sentencing Guidelines, with its inherent certainty with respect to the amount of time a defendant will spend in prison, has made it especially important for the Court to require that the government accurately memorialize any relevant conduct "admission." From a separation of powers standpoint, it is imperative that the Judiciary, and not the Executive, determine the defendant's sentence. This recording or corroboration requirement would pose a very minimal burden on the government while preventing overreaching and abuse by law enforcement officials. Indeed, its *voluntary* use by law enforcement is already widespread. However, in a federal context, for the reasons set forth above, the procedure should be made mandatory.

VI. CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, and that the decision below be reversed, or in the alternative, the decision below be summarily vacated and the case remanded for adequate consideration below.

Respectfully submitted,



IGNACIO R. GARCIA
Counsel of Record

LANI RAE SUISO GARCIA
RANDALL L.K.M. ROSENBERG
Law Offices of Garcia & Garcia
Dillingham Transportation Bldg.
735 Bishop Street, Suite 308
Honolulu, Hawaii 96813
(808) 536-4270

Counsel for Petitioner
JOHN F. CAMACHO

APPENDIX

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 90-10024
Plaintiff-Appellee,	)	
	)	D.C. # CR-89-0648-HMF
v.	)	
	)	
JOHN F. CAMACHO, JR.,	)	MEMORANDUM*
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding
Argued and Submitted December 10, 1990
Submission Vacated December 10, 1990
Resubmitted February 26, 1991
Pasadena, California

Before: SNEED, SCHROEDER and CANBY, Circuit Judges.

Appellant John Camacho pled guilty to two counts of possession of cocaine with intent to distribute. Camacho was sentenced to 97 months in prison. He now appeals his conviction and sentence. We affirm.

Camacho first claims that the district court erred in denying his motion to suppress incriminating statements he made while in police custody. Camacho claims that a DEA agent continued to question him after Camacho had expressed his desire to consult with counsel, eliciting incriminating statements in violation of the sixth amendment. This claim has no merit in light of the district

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

court's findings that Camacho initiated discussions with police after invoking the right to counsel.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [The accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-85; *Minnick v. Mississippi*, 111 S. Ct. 486, ____, 59 U.S.L.W. 4037, 4038-39 (1990). Three years later, the Court established a two-step inquiry to determine the admissibility of statements made after invocation of the right to counsel. First, the reviewing court must determine whether the accused has actually invoked the right to counsel. Second, if the accused has invoked the right to counsel, incriminating statements are admissible only (1) if the accused initiated further discussions with the police; and (2) if the accused "knowingly and intelligently" waived the right to counsel. *Smith v. Illinois*, 469 U.S. 91, 95 (1984).

Here, it is not disputed that Camacho made an unambiguous request for counsel. The parties dispute whether Camacho initiated further discussions with the agent, or whether the agent's biographical questioning reopened custodial interrogation. Camacho claims that the agent's requests for biographical data, such as age, address and occupation, constituted interrogation because the agent was motivated by a desire to elicit incriminating responses from Camacho. We do not agree.

We have consistently held that in most cases, routine biographical data is not interrogation because the information obtained does not inculpate the accused. *See, e.g., United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046 (9th Cir. 1990); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983). Here, Camacho's responses regarding his employment, age, address, and so forth were unrelated to the crime of which he was accused and could not possibly incriminate him. Therefore, the agent's biographical questioning did not constitute interrogation so as to trigger constitutional protection. *United States v. Perez*, 776 F.2d

797, 799 (9th Cir. 1985) (obtaining information about defendant's identity not interrogation); *compare Gonzalez-Sandoval*, 894 F.2d at 1047 (questions about defendant's alienage were interrogation where defendant was charged with illegal possession of firearm by alien); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986) (questioning defendant about residence was interrogation where police were trying to connect defendant to apartment where cocaine was found).

Because the DEA agent's questioning did not constitute interrogation, we must next consider whether Camacho himself initiated communication with the police after he invoked his right to counsel. The record demonstrates that during the agent's biographical questioning, Camacho asked what he was charged with and whether those charges were federal or local. This question clearly "evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983). Moreover, the agent refrained from asking Camacho about the investigation until after Camacho had signed a waiver of rights form. *See Bradshaw*, 462 U.S. at 1046 (police officer cautioned defendant that he did not have to talk to police before discussing investigation). We hold that the district court did not err in finding that Camacho initiated interrogation with the DEA agent.

Nor did the district court err in finding that Camacho's waiver of his right to counsel was knowing and intelligent. In determining whether a waiver of rights is knowing and intelligent, the court must consider the totality of the circumstances, including the background, experience and conduct of the accused. *Bradshaw*, 462 U.S. at 1046. Here, the evidence supports the lower court's findings that Camacho made a knowing and intelligent waiver of his right to counsel. Camacho was an ex-police officer with some 19 years' experience on the force. He was read his *Miranda* warnings before being asked the biographical questions, and signed a written waiver form which fully advised him of his rights before making any incriminating remarks.

Camacho also challenges his sentence imposed under the federal guidelines. Camacho claims that the district court erred by considering at sentencing information contained in Camacho's in-

criminating statements. Camacho claims that he should be sentenced based only on the amount of drugs in the offense for which he pled guilty. We disagree. Under section 1B1.3(a)(2) of the Guidelines, evidence of other criminal conduct may be considered in determining the defendant's base offense level, if it is part of the same course of conduct as the offense of conviction. *United States v. Restrepo*, 903 F.2d 648, 653, *reh'g granted en banc*, 912 F.2d 1568 (9th Cir. 1990). Here, Camacho admitted to possessing other quantities of drugs which he intended to distribute. His inculpatory statements provide sufficient evidence of section 1B1.3 relevant conduct.

We also reject Camacho's claim that because he cooperated with authorities by providing information, his incriminating statements cannot be used against him. This is not a case in which the defendant made a formal agreement to cooperate with prosecutors in exchange for immunity from further prosecution. Where such a formal agreement exists, a prosecutor cannot use self-incriminating information against the defendant at sentencing. *See* USSG § 1B1.8(a); *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir. 1989). Here, however, Camacho's incriminating statements were made to a DEA agent in the absence of any agreement. Without a formal agreement contemplating immunity, a district court may use information obtained through a defendant's incriminating statements to increase the defendant's sentence. *United States v. Rutledge*, 900 F.2d 1127, 1132 (7th Cir.), *cert. denied*, 110 S. Ct. 203 (1990); *United States v. Ykema*, 887 F.2d 697, 699-700 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 878 (1990). We thus hold that the district court did not err in considering information gained from Camacho's incriminating statements to increase his base offense level.

AFFIRMED.

SENTENCING GUIDELINES

PART D - OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1 **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)**

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by 2 levels.

(2) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

November 1, 1990

SENTENCING COMMENTARIES

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) • 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); • 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); • 15 KG or more of Cocaine Base; • 300 KG or more of PCP, or 30 KG or more of Pure PCP; • 300 KG or more of Methamphetamine, or 30 KG or more of Pure Methamphetamine; • 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); • 120 KG or more of Fentanyl; • 30 KG or more of a Fentanyl Analogue; • 300,000 KG or more of Marihuana; • 60,000 KG or more of Hashish; • 6,000 KG or more of Hashish Oil.	Level 42

(2) • At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 40
• At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
• At least 5 KG but less than 15 KG of Cocaine Base;
• At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of Pure PCP;
• At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Pure Methamphetamine;
• At least 1 KG but less than 3 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
• At least 40 KG but less than 120 KG of Fentanyl;
• At least 10 KG but less than 30 KG of a Fentanyl Analogue;
• At least 100,000 KG but less than 300,000 KG of Marihuana;
• At least 20,000 KG but less than 60,000 KG of Hashish;
• At least 2,000 KG but less than 6,000 KG of Hashish Oil.

(3) • At least 30 KG but less than 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 38
• At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
• At least 1.5 KG but less than 5 KG of Cocaine Base;
• At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of Pure PCP;
• At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Pure Methamphetamine;

- At least 300 G but less than 1 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 12 KG but less than 40 KG of Fentanyl;
- At least 3 KG but less than 10 KG of a Fentanyl Analogue;
- At least 30,000 KG but less than 100,000 KG of Marihuana;
- At least 6,000 KG but less than 20,000 KG of Hashish;
- At least 600 KG but less than 2,000 KG of Hashish Oil.

(4)
- At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 36
- At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 500 G but less than 1.5 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of Pure PCP;
- At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Pure Methamphetamine;
- At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil.

(5)
- At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 34

- At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 150 G but less than 500 G of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of Pure PCP;
- At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Pure Methamphetamine;
- At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil.

(6)
- At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 50 G but less than 150 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of Pure PCP;
- At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Pure Methamphetamine;
- At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

Level 32

- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil.

(7) • At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 30
- At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of Pure PCP;
- At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Pure Methamphetamine;
- At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil.

(8) • At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 28

- At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 20 G but less than 35 KG of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of Pure PCP;
- At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Pure Methamphetamine;
- At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil.

(9) • At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 26
- At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 5 G but less than 20 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 KG of Pure PCP;
- At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Pure Methamphetamine;
- At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 40 G but less than 160 G of Fentanyl;

- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil.

(10)
- At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 4 G but less than 5 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of Pure PCP;
- At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Pure Methamphetamine;
- At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil.

Level 24

(11)
- At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

Level 22

- At least 3 G but less than 4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of Pure PCP;
- At least 60 G but less than 80 G of Methamphetamine, or at least 6 G but less than 8 G of Pure Methamphetamine;
- At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil.

(12) • At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 20
- At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 2 G but less than 3 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 KG of Pure PCP;
- At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than 6 G of Pure Methamphetamine;
- At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;

- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- 20 KG or more of Schedule I or II Depressants or Schedule III Substances.

(13)
- At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 1 G but less than 2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of Pure PCP;
- At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Pure Methamphetamine;
- At least 200 MG but less than 400 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 8 G but less than 16 G of Fentanyl;
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil.
- At least 10 KG but less than 20 KG of Schedule I or II Depressants or Schedule III substances.

Level 18

(14)
- At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);

Level 16

- At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 500 MG but less than 1 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of Pure PCP;
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Pure Methamphetamine;
- At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 4 G but less than 8 G of Fentanyl;
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil.
- At least 5 KG but less than 10 KG of Schedule I or II Depressants or Schedule III substances.

(15) • At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 14

- At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 250 MG but less than 500 MG of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of Pure PCP;
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Pure Methamphetamine;

- At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 2.5 KG but less than 5 KG of Schedule I or II Depressants or Schedule III substances.

(16) • Less than 5 G Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 12
- Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- Less than 250 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of Pure PCP;
- Less than 5 G of Methamphetamine, or less than 500 MG of Pure Methamphetamine;
- Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 1.25 KG but less than 2.5 KG of Schedule I or II Depressants or Schedule III substances.

(17) • At least 1 KG but less than 2.5 KG of Marihuana; — Level 10
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;

- At least 500 G but less than 1.25 KG of Schedule I or II Depressants or Schedule III substances;
- At least 8 KG but less than 20 KG of Schedule IV substances.

(18)
- At least 250 G but less than 1 KG of Marihuana;
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;
- At least 125 G but less than 500 G of Schedule I or II Depressants or Schedule III substances;
- At least 2 KG but less than 8 KG of Schedule IV substances;
- 20 KG or more of Schedule V substances.

Level 8

(19)
- Less than 250 G of Marihuana;
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 125 G of Schedule I or II Depressants or Schedule III substances;
- Less than 2 KG of Schedule IV substances;
- Less than 20 KG of Schedule V substances.

Level 6

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* Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of pure PCP or methamphetamine, whichever is greater.

In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

SENTENCING COMMENTARIES

§1B1.3. **Relevant Conduct (Factors that Determine the Guideline Range)**

(a) **Chapters Two (Offense Conduct) and Three (Adjustments).** Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and ommissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts or ommissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable guideline.

(b) **Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).** Factors

in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *Conduct "for which the defendant would be otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.*

   In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant "would be otherwise accountable" includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

November 1, 1990

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
B 7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
C 10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
(13)	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96

22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-371	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))